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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-350

PACIFIC LIGHTING SERVICE COMPANY AND SOUTHERN CALIFORNIA GAS COMPANY,
Petitioners,

No. 75-359

THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Petitioners,

v.

FEDERAL POWER COMMISSION, ET AL
Respondent.

On Petitions for a Writ of Certiorari to The United States Court of Appeals for The Ninth Circuit

BRIEF OF TRANSWESTERN PIPELINE COMPANY IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI

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October 6, 1975

FIDELITY PRINTING COMPANY, HOUSTON

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STATEMENT OF THE CASE

The facts here are simple. Transwestern filed revised tariff sheets pursuant to the provisions of § 4 of the Natural Gas Act. Such sheets modified Transwestern's terms of service by setting out schedules of priorities to be followed in the event Transwestern's gas supplies became inadequate to satisfy its certificated requirements. Thirty days notice

was given, as required by the Act. When the Commission did not act to suspend, the revised tariff sheets became effective. Upon complaint, the Commission initiated a proceeding, pursuant to the provisions of § 5 of the Act to investigate the justness and reasonableness of the tariff sheets. Petitioners[1] complain of the Commission's failure to initiate a hearing under § 4 of the Act, arguing that it has the effect of shifting the burden of proof. The Ninth Circuit held that the Commission's decision to proceed under § 5 was discretionary, that it could not hold the Commission had abused its discretion and that any complaint with respect to the conduct of the § 5 proceeding could be examined on review of a final order issued therein.

ARGUMENT

Neither the Act nor This Court's Decision in the *Louisiana Power & Light Company* Case Compels the Result Sought by Petitioners

In contending that the Commission was required to conduct hearings under § 4, Petitioners misconceive the structure and mechanics of the Act with respect to the review of rates and tariff changes. Section 4 provides that no change shall be made "except after thirty days' notice to the Commission and to the public". It does not require a hearing. It states merely that upon any such filing, the Commission "shall have authority" to enter upon a hearing concerning the lawfulness of the classification specified in the revised tariff sheets and that pending such

[1] Petitioners, Pacific Lighting Service Company and Southern California Gas Company, are referred to as "Pacific Lighting". Petitioners, The State of California and the Public Utilities Commission of the State of California, are referred to as the "California PUC". General Motors Corporation, which submitted a brief in support of such petitions, is referred to as "GM". Transwestern Pipeline Company is referred to as "Transwestern". Respondent, the Federal Power Commission, is referred to as the "Commission".

hearing and decision the Commission "may suspend" the operation of the tariff sheets for a period no longer than five months beyond the time they would otherwise go into effect. This clearly vests the Commission with discretion. The Ninth Circuit correctly so held.[2]

With respect to tariff sheets which have become effective, the Commission is authorized by § 5 of the Act, on its own motion, or upon complaint, to conduct hearings to determine whether such rates, classifications or practices set forth therein are unjust, unreasonable, unduly discriminatory or preferential and to fix the rates, charges, and classifications to be thereafter observed and enforced. This, the Commission has undertaken to do. The interests of the Petitioners are thus fully protected.[3]

Petitioners complain that the Commission's decision *not* to initiate hearings under § 4 of the Act to review Transwestern's revised tariff sheets is not supported by substantial evidence. This is akin to saying that an evidentiary hearing must be held on each tariff change filing to determine whether a hearing should be held on such filing. Clearly the Act does not impose this requirement on the Commission. Indeed, no substantial evidence question exists. The revised tariff sheets became effective pursuant

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[2] It is well established that the determination of whether or not to suspend revised tariff sheets, lawfully filed, is a matter committed solely to the discretion of the Commission with respect to which no right of judicial review exists. *Aberdeen & Rockfish Ry.* v. *SCRAP*, ... U.S. ....., 43 U.S.L.W. 4844, (June 24, 1975); *United States* v. *SCRAP*, 412 U.S. 669 (1973); *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658 (1963); *Municipal Light Boards* v. *F.P.C.*, 450 F.2d 1341 (D.C. Cir. 1971). Confronted with this authority, Petitioners and GM are careful to disclaim any intent to seek review of the Commission's action in not suspending Transwestern's revised tariff sheets. (See Pacific Lighting petition, p. 24; GM Brief, p. 2).

[3] Whether the Commission could permit revised tariff sheets setting forth curtailment plans to go into effect over objection without hearing under either § 4 or § 5 of the Act is not at issue here.

to the operation of § 4 of the Act, not the Commission's May 31, 1973 order.[4]

As this Court held in *Mobile*,[5] § 4 of the Act is self-executing. It requires only that "notice" of tariff changes be given by natural gas companies. Unless the Commission acts, the change becomes effective pursuant to the provisions of the Act. Specifically, the Court stated:

> "Section 4(d) provides not for the filing of 'proposals' but for *notice* to the Commission of any 'change . . . made by' a natural gas company, and *the change is effected if at all, not by an order of the Commission but solely by virtue of the natural gas company's own action.* If the purported change is one the natural gas company has the power to make, the 'change' is completed upon compliance with the notice requirement and the new rate has the same force as any other rate — it can be set aside only upon being found unlawful by the Commission." (emphasis supplied) 350 U.S. at 342.

While Transwestern's revised tariff sheets set forth changed conditions of service in a manner consistent with the Commission's Statements of General Policy, Transwestern had the power to make such tariff filings had such policy statements never issued. The Commission was likewise free, under § 4 of the Act and without regard to its Statements of General Policy, to decline to suspend or enter upon a hearing with respect to Transwestern's revised tariff sheets. Petitioners' complaints about

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[4] Pacific Lighting undertakes to seize upon a statement in the Commission's brief below to the effect that the May 31, 1973 order, permitting Transwestern's revised tariff sheets to go into effect, was supported by substantial evidence. (See PL Petition, p. 12-19). This statement was corrected by Commission counsel on oral argument. Excerpts from the Reporter's transcript of the proceedings are set forth in Appendix A to this Brief.

[5] *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956).

the Commission acting pursuant to its statements of policy in Orders Nos. 431, 467, 467-A, and 467-B are thus beside the point.

Nor does this Court's decision in *F.P.C.* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972) support Petitioners. The Court did not purport to write § 5 out of the Act as a review vehicle for curtailment plans. To the contrary, it emphasized the "broad powers" and "flexibility" which the Commission had under the Act to implement curtailment plans. In this respect, the Court stated:

> "Since curtailment programs fall within FPC's responsibilities under the head of its 'transportation' jurisdiction, the Commission must possess broad powers to devise effective means to meet these responsibilities. FPC and other agencies created to protect the public interest must be free, 'within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances.'" 406 U.S. at 642.

The Court does not hold or intimate at any point in its decision that hearings on revised tariff sheets setting forth curtailment priorities *must* be conducted under § 4 of the Act. Rather, it recognizes specifically the Commission's authority to review curtailment plans under § 5 of the Act, stating that in such hearings the Commission would have "emergency authority to issue interim orders effecting a curtailment plan", 406 U.S. at 644, n. 18, and further, that when the public interest required, the Commission could accept the filing and "implement it immediately". 406 U.S. at 645.

In permitting Transwestern's filing to take effect immediately and initiating a hearing under § 5 of the Act pursuant to the complaint of the California PUC, the Commission was exercising the "broad powers" to which this

Court referred and was acting within the scope of its discretion and authority. Moreover, to the extent it has placed the burden of proof on petitioners to support their complaints and objections to Transwestern's curtailment plan, it has acted in entirely "pragmatic" manner.[6]

As the Commission's May 31, 1973 Order states, Transwestern's revised tariff sheets set forth curtailment procedures solely with respect to its CDQ Rate Schedules. It has only two purchasers under these rate schedules, Pacific Lighting Service Company and Cities Service Gas Company. Sales to these customers account for approximately 99% of its total sales volume (see PL Petition, Appendix p. 7). Unlike United in the *LP&L* case, Transwestern makes no direct sales of significant volumes. It has no "unique knowledge of its customers' needs, ability to substitute other fuel sources or other relevant [customer-related] considerations" (*Louisiana Power & Light Co.*, 406 U.S. at 645). It has no control over the disposition of the volumes which it sells to Pacific Lighting and Cities Service and has no knowledge, other than that furnished by such parties, of how volumes sold by it are used. It would be required to rely on data made available by Petitioners and Cities Service in any proceeding reviewing its revised tariff sheets and any presentation it might make with respect to the end-use of such volumes would, of necessity, be based on facts provided by these parties and not from any knowledge of its own.

Under these circumstances, the Commission acted within the scope of its statutory authority and discretion in

[6] This assumes that in a hearing under § 4 of the Act, Transwestern would have the burden of proof. While there is dictum in the *LP&L* case supporting this contention, the Act does not so provide. *Cf. American Louisiana Pipeline Co.* v. *F.P.C.*, 344 F.2d 525 (D. C. Cir. 1965).

requiring the parties having the facts to support their complaints. Those who assert that their peculiar circumstances make the general orders of priority approved by the Commission and incorporated in Transwestern's revised tariff sheets unreasonable, discriminatory or preferential should have the burden of establishing the facts which support their conclusion. This is all the Commission has undertaken to do. Contrary to Pacific Lighting's complaint that the Commission has "shifted" the burden of proof, it has simply placed it where it properly belongs.

The Commission's action was correct. The Ninth Circuit's decision was correct. Petitioners are fully protected, as a practical matter, by the proceedings which the Commission has initiated under § 5 of the Act. The burden of proof was properly placed on the parties attacking the tariff sheets in effect pursuant to the mechanics of the Act and having access to the information.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

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* * *

MR. STAFFIER: I would like to make one thing clear here. I am afraid in rereading our brief there may have been some confusing statements in there. First of all, the Commission did not find that the Transwestern curtailment plan was just and reasonable because it conformed with Order 467. That would have been improper because 467 was not a Rule and, therefore, does not provide evidence upon which to make a finding of justice [sic] and reasonableness. That is exactly not what they did. All they did is say that it conformed to 467 and therefore we are going to exercise our discretion not to suspend it and not to embark upon a Section 4 hearing. It was not a finding of justness and reasonableness, and there is no need for substantial evidence. (Tr. 30-31).

• • •

MR. STAFFIER: Before the Commission could make any finding with regard to the justness and reasonableness of a conforming plan such as Transwestern's, everybody would have the opportunity to be heard because it would not make that finding until after the completion of the Section 5 hearing. You see, there is the [sic] requirement that the Commission find a file [sic] tariff to be just and reasonable when it is filed, and it did not do so here. It didn't purport to find this claim [sic] to be just and reasonable. (Tr. 33).